No. 88-1771

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOSEPH A. BONDORNO, LORRAINE KERR (EXECUTRIX OF THE WILL OF GEORGE M. KERR, JR.), and BARBARA K. CLISBY,

Cross-Petitioners,

v.

KAISER ALUMINUM & CHEMICAL CORPORATION and KAISER ALUMINUM & CHEMICAL SALES, INC.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR CROSS-RESPONDENTS

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Counter-Statement Of The Questions Presented

1. Whether this Court should reconsider and overturn the well-established principle originally settled in *Pierce v. United States,* 255 U.S. 398, 406 (1921), that interest on judgments "rests solely upon statutory provision," and instead fashion a discretionary standard that permits postjudgment interest pursuant to undefined "equitable" principles at rates and over time periods exceeding those prescribed by Congress in the federal postjudgment interest statute, 28 U.S.C. § 1961?

2. Whether this Court would do "equity" by awarding plaintiffs postjudgment interest, exceeding the amount permitted by Congress in 28 U.S.C. § 1961, where the delay in recovery of the judgment was not the result of dilatory conduct on Kaiser's part or frivolous appeals by Kaiser, but rather reflected the uncertainty of Kaiser's liability and plaintiffs' own failure of proof as shown by:

(i) the district court's original directed verdict in Kaiser's favor on liability;

(ii) plaintiffs' initial failure of proof of damages, which led to a two-year delay and the necessity to retry the damage issues;

(iii) two Court of Appeals judges voting in favor of *in banc* reconsideration of the panel decision affirming the 1979 liability finding;

(iv) a dissent from denial of certiorari in this Court with respect to the underlying liability issues;

(v) the Solicitor General's characterization of the Court of Appeals' decision upholding the jury's liability finding as erroneous; and

(vi) the fact that all the appeals from the district court to the Court of Appeals were initiated by plaintiffs, not by Kaiser?

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OPINIONS BELOW

The Judgment of the Court of Appeals is set out in the Appendix to the Petition For A Writ Of Certiorari To The Court Of Appeals For The Third Circuit, (the "Petition") filed by Kaiser Aluminum & Chemical Corporation and Kaiser Aluminum & Chemical Sales, Inc. (collectively "Kaiser") No. 88-1595, at P.A.1.[1] The Opinion of the Court of Appeals, dated January 9, 1989, is reported at 865 F.2d 566 (3d Cir. 1989), and is set out at P.A.3. The Order of the Court of Appeals denying rehearing and rehearing *in banc,* dated February 13, 1989, is set out at P.A.29. The Opinion of the United States District Court for the Eastern District of Pennsylvania (Shapiro, J.), dated April 11, 1988, is set out at P.A.31.

JURISDICTION

The Judgment of the Court of Appeals awarding postjudgment interest was entered January 9, 1989. (P.A.1). Kaiser filed a timely petition for rehearing and suggestion of rehearing *in banc,* which was denied by Order dated February 13, 1989, with a notation that Circuit Judges Becker, Stapleton and Hutchinson would have granted the petition for rehearing *in banc.* (P.A.29-30). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition was timely filed by Kaiser under 28 U.S.C. §2101(c) and Rules 20.2 and 20.4 of this Court. This Court, by Order dated June 19, 1989, granted the Petition and the Conditional Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit, filed by Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George

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1. References to the Appendix to the Petition are cited herein as "P.A.____".

M. Kerr, Jr.) and Barbara K. Clisby,[2] No. 88-1771. (J.A.311).[3]

STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. §1961 as it read prior to October 1, 1982 and amended 28 U.S.C. §1961, which was enacted on April 2, 1982 and became effective on October 1, 1982.

Prior to its amendment in 1982, 28 U.S.C. §1961 provided:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

As amended in 1982, Section 1961 now provides in pertinent part:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by

2. Kaiser will refer to cross-petitioners, Joseph A. Bonjorno, Lorraine Kerr (Executrix of the Will of George M. Kerr, Jr.), and Barbara K. Clisby, who were the plaintiffs in the district court, as "plaintiffs" in order to avoid confusion.

3. References to the Joint Appendix are cited herein as "J.A.___".

> the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal Judges.

COUNTER-STATEMENT OF THE CASE

A chronological statement of the procedural history of this case, from the filing of plaintiffs' Complaint in 1974, until the grant of certiorari by this Court, is set forth in the Statement Of The Case contained in the Brief For Petitioners filed by Kaiser in the case consolidated with this one, No. 88-1595. However, certain features of that procedural history which bear upon this Court's resolution of the issues presented in Cross-Petitioner's Brief are distorted in plaintiffs' Statement Of The Case and require clarification.

A. Plaintiffs' Failure Adequately To Prove Damages Caused The Delay In Entry Of A Valid Judgment From August 1979 To December 4, 1981.

Plaintiffs wrongly attribute the delay in entry of a valid judgment from 1979 to 1981 to Kaiser's post-trial motions. (Brief, at 2, 4, 20, 27)[4]. Plaintiffs also repeatedly mischaracterize the December 4, 1981 judgment in the amount of $9,567,939 entered in the district court as a "modification," "alteration" and "recalculation" of the 1979 damage judgment. (Brief at 3, 4, 11, 12, 18, 22, 23, 24, 27).

The delay between the jury's liability verdict in 1979 and the entry of the judgment on December 4, 1981, resulted solely from the fact that the 1979 judgment was

4. Kaiser will refer to pages in the Brief For Cross-Petitioners On The Merits of Plaintiffs' Cross-Petition as "Brief, at ___".

invalid and was *vacated* by the district court. Plaintiffs were required to *retry* the entire issue of damages. There was never any "modification" or "recalculation" of damages by the court or the jury. The decision of the district court (set out at J.A.92-128), vacating the invalid 1979 judgment, was not even appealed.

The reason the district court vacated the 1979 judgment was that *plaintiffs' proof of damages* was inadequate. The district court found that "the evidence presented by [plaintiffs] as to the actual dollar amount of damages suffered was so deficient as to require a new trial on damages only." (J.A.112).

The district court said:

> The evidence presented by [plaintiffs'] two damage witnesses, Bonjorno and plaintiffs' expert witness on damages, Dr. Alfred Kuehn, was *incomplete, confusing and generally lacking in probative value.* The factual basis of the projections, predictions and calculations presented by them was never clear from the testimony. (J.A.112).[5]

Further, with respect to Bonjorno's damage testimony, the court found "the record insufficient in establishing the requisite factual basis for Bonjorno's estimates so that the jury could make a rational determination as to their accuracy." (J.A.113). With respect to plaintiffs' expert witness, Dr. Kuehn, the court determined "*that the illusion of complete accuracy created by graphs, charts, and garbled expert testimony created a speculative verdict in this case.*" (J.A.117). The court concluded that "the jury verdict could only be a product of confusion and speculation." (J.A.120). Finally, the court stated, "the deficiency in plaintiffs' proof of damages convinces the court that the verdict as to damages should not stand." (J.A.120). Kaiser cannot be blamed for the shortcomings of plaintiffs' conduct of the trial on

5. Emphasis supplied throughout unless otherwise indicated.

the damage issues.

Plaintiffs also incorrectly contend that their "theory of damages remained the same in the 1979 and 1981 damage trials." (Brief, at 28 n.42). In fact, although plaintiffs continued to seek damages for lost profits and loss of the value of the business as a going concern, the second damage trial bore little resemblance to the first. The first damage trial lasted two days. It consisted of the testimony of two witnesses for plaintiffs. Kaiser put on no evidence.

The second damage trial, before a different jury (a jury that never heard the liability evidence), consisted of fifteen live witnesses and ten witnesses by deposition. The trial lasted two weeks. At the second damage trial, plaintiffs employed two expert witnesses who had not testified in the first trial and who fashioned a wholly different approach to defining the elements of and calculating plaintiffs' damages. Plaintiffs' expert in the first trial posited five different alternative approaches to a damage calculation. In the second trial, plaintiffs' new expert had a single approach totally different from any of the five approaches advanced in the first trial. Unlike the first trial, Kaiser introduced evidence on damages in the second trial.

In short, the 1981 damage trial was a new and wholly separate trial of the damage issue. It did not involve simply a "recalculation," "modification" or "alteration."

B. Kaiser's Liability Involved Unsettled And Controversial Substantive Antitrust Issues Relating to Intra-enterprise Conspiracy And Liability For "Price Squeeze" And Was Not Clear Cut.

Plaintiffs suggest incorrectly that, as of August 1979, liability was a settled issue in this case. On the contrary, until this Court denied certiorari in 1986, plaintiffs' victory on liability was far from clear.

In 1977 and in 1979, plaintiffs tried their case on a Sherman Act §1 conspiracy theory and a Sherman Act §2 attempted monopolization theory. Their §1 case depended on a finding of intra-enterprise conspiracy between a corporation and its wholly-owned subsidiary. Both their §1 and §2 claims were based on a novel theory that Kaiser had subjected plaintiffs to a "price squeeze,"[6] notwithstanding that Kaiser did not supply the raw material to plaintiffs from which plaintiffs made the finished product during the period of the alleged "price squeeze." Therefore, plaintiffs' theory hinged on whether Kaiser could be held vicariously liable for "predatory" conduct because of the pricing practices of Kaiser's two larger competitors, Alcoa and Reynolds, who *did* supply plaintiffs during the period of the alleged "price squeeze." Plaintiffs were forced to argue that Kaiser was a "price leader" and that Alcoa and Reynolds "followed" Kaiser's price changes. Plaintiffs' antitrust claims also hinged on a controversial and vigorously contested finding that aluminum drainage pipe constituted a separate relevant product market from drainage pipe made of steel or concrete, with which aluminum competed head-on.

At the close of plaintiffs' case at the initial trial in 1977, the district court granted a directed verdict in Kaiser's favor on liability. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* No. 74-122, mem. op. (E.D. Pa. July 20, 1977). The court held that plaintiffs' evidence in their case-in-chief *affirmatively established* that steel and aluminum culvert pipe were not separate product markets, and that Kaiser's market

6. A price squeeze is an economic phenomenon that allegedly occurs when the margin between the price an independent producer has to pay for a raw material and the price the producer can charge for its end product is so small that the producer is unable to earn profits. There are many reasons why such a "price squeeze" may occur because of normal operation of market factors, independent of predatory motive.

share in the relevant market was insufficient to support plaintiffs' antitrust liability theories. *Id.* at 6, 14, 17. It found that, even assuming a parent and wholly-owned subsidiary could illegally conspire, there was insufficient evidence of conspiracy. *Id.* at 10. It found no evidence of an adverse effect on competition and evidence that Kaiser had a "limited position in the market for culvert drainage pipes . . ." *Id.* at 11. With respect to plaintiffs' §2 claims, the court found evidence that Kaiser lacked monopoly power and that Kaiser had "less than a three percent market position in the market made up of aluminum, steel and concrete culvert pipe and a slightly higher percentage of a market consisting only of aluminum and steel pipe." *Id.* at 19.

Plaintiffs appealed the directed verdict and the Court of Appeals reversed, based primarily on its differing assessment of plaintiffs' evidence concerning the product market. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20, 31 (3d Cir. 1978).[7]

In 1979, the case was retried on remand, the district court allowed the case to go to the jury, and the jury found for the plaintiffs on liability. The jury answered separate interrogatories in which it found that the relevant market consisted of aluminum drainage pipe alone and that Kaiser had violated §1 and §2, but answered a single interrogatory that Kaiser's violations caused plaintiffs' injury, without distinguishing between the §1 and §2 violations. (J.A.87-89).

After the 1981 retrial on damages, judgment for treble damages was entered in favor of plaintiffs for $9,567,939 on December 4, 1981. (J.A.146). The district court thereafter granted j.n.o.v. on part of the

7. Kaiser's Petition For A Writ of Certiorari (No. 78-148 October Term 1978) raising, *inter alia,* the intra-enterprise conspiracy doctrine was denied by this Court. *Kaiser Aluminum & Chemical Corp. v. Columbia Metal Culvert Co., Inc.,* 439 U.S. 876 (1978).

$9,567,939 judgment, reducing it to $4,651,560. (J.A.183). Plaintiffs appealed the partial j.n.o.v. and Kaiser cross-appealed the liability issues, including the viability of plaintiffs' intra-enterprise conspiracy theory and the liability of a defendant for a "price squeeze," where the defendant did not supply the product to the allegedly injured plaintiff and therefore could not directly cause any alleged "squeeze". The Court of Appeals put the case in suspension pending this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), in which this Court had granted certiorari.

In *Copperweld,* decided June 19, 1984, this Court held that a parent and its wholly-owned subsidiary "are incapable of conspiring with each other for purposes of §1 of the Sherman Act." 467 U.S. at 777. Since the Kaiser subsidiary was a wholly-owned subsidiary, the *Copperweld* holding thus rendered at least the §1 liability finding invalid.[8]

Copperweld notwithstanding, the Court of Appeals upheld the liability finding against Kaiser under §2 of the Sherman Act. (J.A.185-211). When Kaiser petitioned for rehearing *in banc,* two Court of Appeals judges, Becker and Adams, voted to have the court *in banc* review the panel decision. Judge Adams, the author of the panel decision in the first appeal to the Court of Appeals, filed a written statement in which he questioned the panel's decision in light of *Copperweld* and further questioned whether the "price squeeze" doctrine should extend to a case where *"during the years in question plaintiff was purchasing its raw materials*

8. Kaiser argued that the §2 liability finding also could not stand. The jury had returned a single answer with respect to whether Kaiser's §1 and §2 violations *caused* plaintiffs' injuries. Thus, it was impossible to determine whether the causation finding rested on the invalid §1 theory. *See Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co.,* 370 U.S. 19 (1962).

from Alcoa and Reynolds, rather than from the defendant" and *"there is no evidence of any conspiracy between defendant and the other suppliers of the raw material." Bonjorno v. Kaiser Aluminum & Chemical Corp.,* Nos. 83-1047, 83-1079, slip op. at 3-4 (3d Cir. March 8, 1985).

When Kaiser requested that this Court review the liability determination, raising the issue of liability for an alleged "price squeeze" (No. 84-1907 October Term 1984, Petition For A Writ Of Certiorari) this Court requested the views of the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 474 U.S. 811 (1985). They informed this Court that they believed the Court of Appeals decision had "obvious shortcomings" and was "erroneous." *See* Brief For The United States As *Amicus Curiae,* No. 84-1907, at 9, 17 (May 1986). They observed that "Kaiser's conduct may well be characterized as no more than aggressive competition." *Id.* at 18. This Court denied certiorari with the notation that Mr. Justice White would have granted review. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 477 U.S. 908 (1986). Kaiser paid the judgment on July 3, 1986, the day after the $9,567,939 judgment was reinstated in the district court on remand from this Court and the Court of Appeals.

Although liability was eventually upheld in 1986, until then there were very substantial grounds for Kaiser to believe that plaintiffs' novel theory of liability would not prevail, particularly after this Court decided *Copperweld.* Plaintiffs' statement that "Kaiser knew, as of August 1979, that it was liable for treble damages for destruction of Plaintiffs' business . . ." (Brief, at 46) is plainly incorrect.

SUMMARY OF ARGUMENT

The federal postjudgment interest statute, 28 U.S.C. §1961, governs the calculation of postjudgment interest on "any money judgment in a civil case recovered in a district court." In this civil antitrust case, plaintiffs seek postjudgment interest on a money judgment of $9,567,939 entered in the district court for the Eastern District of Pennsylvania. Thus, §1961 applies to the calculation of postjudgment interest. The Court of Appeals was bound by its provisions. *See Pierce v. United States,* 255 U.S. 398, 406 (1921). To the extent that any federal court possesses "equitable" or "inherent" powers, these powers may not be exercised in a way that conflicts with a governing federal statute. Such powers do not permit the Courts of Appeals to deviate from the plain terms of §1961 when calculating postjudgment interest. *See, e.g., Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988); *Thomas v. Arn,* 474 U.S. 140, 148 (1985).

Section 1961 prescribes both the *time period* during which postjudgment interest runs and the *rate* of postjudgment interest. With respect to *time period,* §1961 mandates that interest "shall be calculated" from the date of the "entry of the judgment" in the district court. In this case, the judgment was entered on December 4, 1981, and was reinstated on July 2, 1986. Therefore, postjudgment interest may not begin to accrue in this case prior to December 4, 1981. The Court of Appeals correctly rejected plaintiffs' request for postjudgment interest measured from August 1979 — two years *prior* to the entry of the judgment. Plaintiffs' request for interest *prior* to December 4, 1981 is nothing more than a request for *prejudgment* interest, to which they are not entitled.

Section 1961 also prescribes a specific *rate* of postjudgment interest. For postjudgment interest calculations on judgments entered prior to October 1, 1982,

§1961 provides that interest shall be calculated "at the rate allowed by State law." For postjudgment interest calculations on judgments entered after October 1, 1982, amended §1961 provides that interest shall be calculated "at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment." Plaintiffs' request for postjudgment interest at a "prime rate" — a rate that exceeds the rate set forth in both the prior and amended version of §1961 — conflicts with the plain terms of the governing federal statute. The Court of Appeals correctly rejected plaintiffs' position.

Were this Court to consider the "equities" in this case, plaintiffs nevertheless would not be entitled to postjudgment interest exceeding the amount prescribed by Congress. Any delay in plaintiffs' recovery of the $9,567,939 treble damage judgment was not the result of dilatory conduct on Kaiser's part or frivolous appeals by Kaiser. It only reflected the uncertainty of Kaiser's liability and plaintiffs' own failure of proof as shown by (i) the district court's original directed verdict in Kaiser's favor on liability; (ii) plaintiffs' initial failure of proof of damages, which led to a two-year delay and the necessity to retry the damage issues; (iii) two Court of Appeals judges voting in favor of *in banc* reconsideration of the panel decision affirming the 1979 liability finding; (iv) a dissent from denial of certiorari in this Court with respect to the underlying liability issues; (v) the Solicitor General's characterization of the Court of Appeals' decision upholding the jury's liability finding as erroneous; and (vi) the fact that all the appeals from the district court to the Court of Appeals have been initiated by plaintiffs, not by Kaiser.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT POSTJUDGMENT INTEREST MAY NOT RUN FROM THE DATE OF A VACATED JUDGMENT.

Despite the existence of a federal postjudgment interest statute permitting interest only from "the date of entry of the judgment," and despite the fact that *prejudgment* interest is clearly unavailable in this case, plaintiffs seek interest for a period of time *prior* to entry of a valid judgment and prior to the determination of the amount of their damages. Their request was properly denied by the Court of Appeals.

An award of postjudgment interest "is a charge for withholding the total amount of damages once that sum has been determined." Note, *Interest on Judgments In The Federal Courts,* 64 Yale L.J. 1019, 1019 (1955). Here, the amount of damages was not determined until 1981. Plaintiffs concede that postjudgment interest is intended to "preserve the value of a *judgment*." (Brief, at 40). The judgment to be preserved here was originally entered on December 4, 1981 and reinstated on July 2, 1986. Plaintiffs' request for interest for the period prior to entry of a valid judgment would not preserve the value of the judgment. Rather, it is simply a disguised request for an award of *prejudgment* interest, to which they are not entitled.

A. The 1979 Judgment Was Vacated Because Plaintiffs Did Not Prove Entitlement To Damages And The 1981 Judgment Was Not A "Recalculation".

Plaintiffs proffer a variety of unsound reasons why interest should run prior to the entry of the only valid judgment in their favor.

First, plaintiffs argue that "[t]his Court has recognized that interest on the judgment should be awarded from the date of the original judgment over periods of

court delay even if the amount of the judgment is subsequently altered." (Brief, at 18). In support of this proposition, plaintiffs cite four patently inapposite cases: *De La Rama v. De La Rama,* 241 U.S. 154, 159-60 (1916); *Kneeland v. American Loan & Trust Co.,* 138 U.S. 509 (1891); *Ex Parte Republic of Colombia,* 195 U.S. 604 (1904); *The Conemaugh,* 189 U.S. 363 (1903). In each of these four cases, an appellate court reduced a lower court monetary award and the court allowed interest on the lower amount from the date the underlying award was entered in the trial court. In each of those cases, a part of the underlying monetary award was left standing and interest was awarded on that amount. Obviously, these cases have no application here, where the August 22, 1979 judgment was *wholly vacated* by the lower court because of plaintiffs' failure of proof and was not thereafter "altered", "modified" or "recalculated".

The reasoning underlying these four cases is set forth in *Kneeland,* where the Court explained that the appellate decision "in so far as the separate and distinct matters embraced in the former decrees were ordered to be incorporated into the new, it is to be regarded as *pro tanto* an affirmance." *Id.* at 511-12. Thus, these cases simply embody the principle of Fed. R. App. P. 37, that where a judgment for money is *affirmed* by the Court of Appeals, interest runs from the date of judgment in the district court.

Here, the 1979 damage award was vacated *in its entirety*. It was not altered, reduced, modified, recalculated or affirmed on appeal. It was not even appealed.[9]

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9. Plaintiffs incorrectly assert that they could not appeal the district court's Order vacating the 1979 judgment. While the Order was not immediately appealable, review could have been obtained when plaintiffs appealed to the Third Circuit in 1983. *See Allied Chemical Corp. v. Daiflon, Inc.,* 449 U.S. 33, 34 (1980). Indeed, if plaintiffs thought themselves entitled to interest on that 1979 judgment, they clearly should have appealed the Order at that time.

The district court vacated the August 22, 1979 judgment because plaintiffs' damage evidence "was so deficient as to require a new trial. . . ." Plaintiffs' evidence was "incomplete, confusing and generally lacking in probative value." (J.A.112). Plaintiffs' evidence was illusory and "created a speculative verdict. . . ." (J.A.117). The court concluded — and plaintiffs never contested this conclusion — that "[t]he deficiency in plaintiff's proof of damages convinces the court that the verdict as to damages should not stand." (J.A.120).

Plaintiffs also contend that postjudgment interest should run from August 22, 1979, because by that date, the jury had returned a *liability* verdict.[10] Plaintiffs proffer the following convoluted reasoning unsupported by any authority:

> . . . there is certainly no justification for denying interest *after* the date the jury finds (which finding is never thereafter set aside) that the wrongdoer unlawfully caused damage in some amount. At that point the Defendant knows it has a damage exposure (albeit in an undetermined amount) that it cannot avoid. Mindful of this very situation, and the ever more prevalent practice of bifurcated trials between liability and damages, the Federal Rules of Civil Procedure wisely give the Defendant the option of stopping or cutting back on the running of

NOTES *(Continued)*

Having failed to contest the district court's vacation of the August 22, 1979 judgment, plaintiffs must concede that a valid judgment in their favor was not entered until after the retrial on damages in 1981.

10. Plaintiffs do not argue that interest should run from the date of the liability verdict returned on August 16, 1979, but argue rather that it should run from the vacated judgment entered on August 22, 1979. Interest measured from a *verdict* would be contrary to the specific terms of §1961, as Kaiser has argued at length in its Brief For Petitioners in No. 88-1595.

> interest by tendering what it feels may be its ultimate damage responsibility.

(Brief, at 19-20). Thus, plaintiffs argue that despite the fact that the federal statute governing the calculation of postjudgment interest specifically provides that interest runs from the date of "*the entry of the judgment*," a defendant against whom a liability verdict but no valid *judgment* has been entered should guess at "*what it feels may be its ultimate damage responsibility*" and hand it over to the plaintiff, who has neither proved the amount of its damages nor obtained a judgment.

Surely the law does not require such an absurd thing. Fed. R. Civ. P. 67, which plaintiffs cite in support of this position, deals with paying money *into court,* not tendering money to the plaintiff. Moreover, Rule 67 does not address the issue whether paying money into court stops the running of postjudgment interest. Indeed, at least two courts have held that deposit into court under this rule does not stop the running of interest. *See, e.g., United States ex rel. Garrett v. Midwest Const. Co.,* 619 F.2d 349, 353-54 (5th Cir. 1980); *Blasini-Stern v. Beech-Nut Life Savers Corp.,* 429 F. Supp. 533, 534-35 (D. Puerto Rico 1975).

Plaintiffs' request for interest beginning in 1979 is nothing more than a request for interest from the date of a liability verdict. Section 1961, however, only permits interest measured from the date of "entry of the *judgment.*" Plaintiffs are not entitled to *postjudgment* interest until they have obtained a valid *judgment.* As both the Court of Appeals and the district court observed in this case, the "verdict on liability alone was insufficient under Fed. R. Civ. P. 54(c) to allow or require the court to enter judgment." (P.A.11, 40-41). A construction of the postjudgment interest statute which would allow postjudgment interest from the jury's liability finding cannot be squared with the plain language of the statute. That construction was properly rejected by the

court below. *See, e.g., Mansell v. Mansell,* 109 S. Ct. 2023, 2030 (1989) (litigant attempting to construe statute contrary to its plain language bears difficult burden).

The conceded purpose of postjudgment interest is to preserve the value of the judgment from the time the judgment is entered until payment. Plaintiffs initially obtained "the judgment" of $9,567,939 on December 4, 1981. The December 4, 1981 judgment was reinstated on July 2, 1986. Thus, the only two possible dates from which interest may run to preserve the value of the judgment are December 4, 1981 or July 2, 1986.

B. Plaintiffs' Request For Interest Measured From 1979 Is A Request For Prejudgment Interest To Which Plaintiffs Are Not Entitled.

Plaintiffs' request for interest for the period prior to entry of a valid judgment in their favor boils down to nothing more than a request for *prejudgment* interest. Plaintiffs' explanation why interest should accrue during this period makes this obvious. Pointing out that their *damages* were calculated as of 1977, they suggest that to deny interest on the damages from 1979 until 1981 would be to deny full compensation.[11] (Brief, at 20 n.28). However, this Court has recently explained that it is *prejudgment* interest, not *postjudgment* interest, which "serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation. . . ." *West Virginia v. United States,* 479 U.S. 305, 310 n.2 (1987). Postjudgment interest only serves to

11. The elements of damage plaintiffs sought were lost profits up to May 31, 1977 and the value of the business of Columbia Metal Culvert Co., Inc. as a going concern as of that date. The value of the business as a going concern was calculated by discounting a projected stream of profits in the future from May 31, 1977. Consequently, plaintiffs' damages, in fact, included an element of damages for the period following May 31, 1977.

preserve the value of the judgment from the date the judgment is entered.

Plaintiffs plainly are not entitled to prejudgment interest. Prior to 1980, the antitrust laws did not permit recovery of prejudgment interest at all. *See, e.g., Fishman v. Estate of Wirtz,* 807 F.2d 520, 562 (7th Cir. 1986); *Trio Process Corp. v. L. Goldstein's Sons, Inc.,* 638 F.2d 661, 663 (3d Cir. 1981); *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 80 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363 (1973); H. Rep. No. 96-875, 96th Cong., 2d Sess. 5, *reprinted in* 1989 U.S. Code Cong. & Admin. News 2766, 2769. The Second Circuit reasoned that "treble damages are sufficient penalty" and "interest need not be included." *Trans World Airlines,* 449 F.2d at 80. In 1980, Congress enacted the Antitrust Improvements Act, which provided for prejudgment interest under certain circumstances for cases filed after its enactment.[12] Although its provisions are not applicable to this case, the present statutory prerequisites[13] for an award of prejudgment

12. Section 4(b) of The Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154, 1157, provided that: "The amendments made by this section [amending Section 15(a)] shall apply only with respect to actions commenced after the date of the enactment of this Act [Sept. 12, 1980]."

13. Section 4 of the Clayton Act, 15 U.S.C. 15(a), as it currently reads, provides in part that:

> The court may award under this section, pursuant to a motion by such person promptly made, *simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment,* or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider *only* –
>
> (1) whether such person or the opposing party, or either party's representative, *made motions or asserted claims or defenses so lacking in merit* as to show that such

interest highlight the reasons why plaintiffs may not recover interest on the treble damages for the period prior to December 4, 1981.

Under the 1980 statute, a statute specifically designed by Congress to permit prejudgment interest in appropriate cases, the trial court must first determine that the defendant engaged in dilatory conduct. Additionally, the statute only authorizes prejudgment interest on *single* damages, not the prejudgment interest on *treble* damages to which plaintiffs contend they are entitled in this case.

The district court in this case specifically found that the "appeals of Kaiser to the Court of Appeals and the petition for certiorari to the Supreme Court were not frivolous and not for the purpose of delay. . . ." (P.A.46-47). Although they argue that they should receive an award of interest beyond that permitted by 28 U.S.C. §1961 as a general disincentive to all litigants to "delay payment by exhausting all post-trial and appellate remedies that the judicial process allows," (Brief, at 13), plaintiffs do not argue that Kaiser engaged in intentional delay tactics. Putting to one side the explicit finding by

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NOTES *(Continued)*

party or representative *acted intentionally for delay, or otherwise acted in bad faith;*

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, *violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior* or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, *engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.*

The legislative history of the prejudgment interest amendment to 15 U.S.C. §15(a) shows that Congress was concerned primarily with providing a disincentive for intentional delaying tactics by defendants "anticipating an unfavorable judgment." H. Rep. No. 96-875, 96th Cong., 2d Sess. 2, 7, *reprinted in* 1980 U.S. Code Cong. & Admin. News at 2767, 2771.

the district court that Kaiser did not engage in dilatory tactics, the fact that one district court judge, two Court of Appeals judges, the Solicitor General and the Assistant Attorney General in charge of the Antitrust Division (and possibly one member of this Court) questioned whether Kaiser was liable in this case renders it impossible for plaintiffs to make the requisite showing under amended §15(a).

1. The Seventh Circuit's Analysis In *Needham v. White Laboratories, Inc.* Should Be Applied In this Case.

In a very similar case, the Court of Appeals for the Seventh Circuit refused to award interest from the date of a vacated judgment. *Needham v. White Laboratories, Inc.*, 847 F.2d 355 (7th Cir. 1988). Needham obtained a judgment in 1979 for $800,000 in a products liability action. The Court of Appeals reversed the judgment because of error in the admission of evidence and remanded for a new trial. The district court ordered a new trial limited to the liability issue, deciding that, if plaintiff won again, her damages would be the same $800,000 that she had been awarded at the end of the first trial. Needham again prevailed and was awarded $800,000. *Id.* at 357. The new judgment was not entered until some time after November, 1986. *Id.*

Needham sought interest on the $800,000 judgment entered in 1986 from 1979, arguing "that if $800,000 was a correct assessment of her damages in 1979 (which no one questions) it *must* be too little" seven years later. *Id.* at 360. (emphasis in original). Just as plaintiffs have done here, the "plaintiff trie[d] to convert the issue into one of postjudgment interest. . ." *Id.* at 361. The Court of Appeals for the Seventh Circuit, in an opinion authored by Judge Posner, correctly concluded that the plaintiff was not seeking *postjudgment* interest, but rather an award of *prejudgment* interest. It

stated that although "courts award postjudgment interest from the date of a judgment that was reinstated after having been set aside by the trial judge or reversed by an intermediate appellate court, that is not what happened here. *The 1979 judgment was never reinstated.* It was set aside, the case was retried, and a new judgment was entered, albeit one identical in amount to the old judgment." *Id.* The Court of Appeals proceeded to consider whether *prejudgment* interest was available and found that it was not. *Id.* at 361-62.

The *Needham* reasoning is sound and applies with full force here. Plaintiffs may not convert the issue into one of postjudgment interest. Congress has determined that the date of entry of the judgment divides prejudgment interest from postjudgment interest. Judgment in this case was initially entered on December 4, 1981. An interest award covering any period prior to that date would constitute an award of prejudgment interest to which plaintiffs clearly are not entitled.

2. The Ninth Circuit's Decision In *Handgards* Does not Support Calculation Of Interest From August 22, 1979.

In support of their position that interest should run from the August 22, 1979 vacated judgment, plaintiffs place primary reliance on *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282 (9th Cir. 1984), *cert. denied,* 469 U.S. 1190 (1985). That case is readily distinguishable and, in any event, was incorrectly decided.

The Ninth Circuit's decision was grounded on two prior Ninth Circuit cases: *Mt. Hood Stages, Inc. v. The Greyhound Corp.*, 616 F.2d 394, 406 (9th Cir.), *cert. denied,* 449 U.S. 831 (1980), and *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1310 (9th Cir.), *cert. denied,* 459 U.S. 1009 (1982). In those cases, appeals were taken solely on the issue of the statute of limitations. The determination of the amount

of damages was not questioned or appealed. When the statute of limitations issue was resolved and liability was reaffirmed, the identical damage judgments were restored without reconsideration. The courts allowed postjudgment interest calculated from the date damages were initially determined, even though the judgments were not entered until after the appeal.

In *Handgards,* the court followed this reasoning in a case where, after the liability appeal, a second jury was permitted to reconsider the amount of damages and a higher damage amount was found. The court found that the first damage judgment and the second damage judgment were essentially identical: both were valid and both included the same elements. Only the standard with respect to liability had been addressed and altered as a result of an appeal. *See Handgards,* 743 F.2d at 1299 ("it can be said that the second judgment 'remains the same – in the same amount, for the same damages incurred during the same period' ") (quoting *Twin City,* 676 F.2d at 1311).

The *Mt. Hood, Twin City* and *Handgards* decisions do not apply here, where the first damage verdict was vacated because it was patently *defective.* The judgment entered here on December 4, 1981 can in no way be said to be the "same" as the 1979 defective judgment. Moreover, the approach taken in the Ninth Circuit's *Handgards* line of cases is wrong and should not be followed by this Court. Clearly, the measurement of interest may not begin until plaintiff has adequately proven the existence of its damages. *Needham* represents the better view, recognizing that until entry of a judgment based on a valid liability finding *and* a valid damage assessment, any interest is *prejudgment* interest and its availability must be evaluated under the applicable standards for an award of *prejudgment* interest.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT IT HAD NO POWER TO DEVIATE FROM THE POSTJUDGMENT INTEREST RATE MANDATED BY THE FEDERAL POSTJUDGMENT INTEREST STATUTE.

Plaintiffs ask this Court to hold that the Court of Appeals erred in not awarding postjudgment interest at a floating *prime rate,* compounded monthly, notwithstanding a federal statute prescribing a *fixed* rate of postjudgment interest, not keyed to a prime rate, that does not compound monthly.[14]

A. The Court Of Appeals Was Bound By The Terms Of §1961.

Prior to 1982, §1961 provided that interest on "any money judgment in a civil case recovered in a district court . . . *shall be calculated* from the date of the entry of the judgment, *at the rate allowed by State law.*" Amended §1961 provides that:

> . . . interest *shall be calculated* from the date of the entry of the judgment, *at a rate equal to the* coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
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> * * *
>
> Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be *compounded annually.*

28 U.S.C. §1961.

Plaintiffs declare that §1961 is simply a "rule of convenience" for "run-of-the-mill" judgments. Plaintiffs contend that the statute "merely mandates the minimum 'floor' amount of interest that must be awarded as a matter of course on all judgments entered in federal District Courts. . . ." (Brief, at 8, 32 n.47). Plaintiffs suggest the Court of Appeals should have exercised its "inherent equitable power" to award interest at a floating *prime rate,* compounded monthly.

Plaintiffs' argument is without merit. Plaintiffs cite no authority for this notion and overlook the explicit mandate of §1961. The federal lawmaking power "is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc. v. Transport Workers Union,* 451 U.S. 77, 95 (1981). In a case similar to this one, where respondents were advocating a judicially-created basis for recovery of attorneys' fees, this Court observed that "it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested by respondents . . ." *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 271 (1975). Here, Congress has prescribed the appropriate rate of postjudgment interest in the prior and amended versions of §1961. The Court of Appeals properly held itself bound to apply the law enacted by Congress.

This Court has previously rejected similar attempts by litigants to obtain postjudgment interest beyond the amount allowed by statute. In *Pierce v. United States,* 255 U.S. 398, 406 (1921), this Court stated:

> At common law judgments do not bear interest; *interest rests solely upon statutory provision. The*

14. Depending on the outcome of Kaiser's Petition to this Court, No. 88-1595, involving the retroactivity of the amendment to §1961, which changed the applicable rate, the applicable statutory rate is either six percent simple interest or the T-bill rate fixed by amended §1961, which provides for compounding annually.

> *only applicable statute of the United States is section 966 of the Revised Statutes (Comp. St. §1605)* (citations omitted).[15]

As recently as 1987, the Court acknowledged the rule set forth in *Pierce* that, except when this Court enters a judgment pursuant to its original jurisdiction, "post-judgment interest may not be awarded absent statutory authority." *Texas v. New Mexico,* 482 U.S. 124, 132-33 n.8 (1987).[16] In *Monessen S. Ry. v. Morgan,* 108 S. Ct. 1837, 1843 (1988), this Court held that successful plaintiffs in FELA actions are not entitled to *prejudgment* interest absent evidence that Congress intended to depart from the *Pierce* rule that interest on judgments must have its source in a federal statute.

Plaintiffs have produced no authority to the contrary. They cite four decisions of this Court that purportedly illustrate "the power of the federal courts to award interest independent of any statutory authority granted by Congress." (Brief, at 35). Not one of these four cases even addresses postjudgment interest. *West Virginia v. United States,* 479 U.S. 305, 308-09 (1987) (prejudgment interest on contractual obligation to pay money); *Billings v. United States,* 232 U.S. 261, 285-87 (1914) (interest as an element of damages in tax delinquency case); *National Bank of the Commonwealth v. Mechanics' Nat'l Bank,* 94 U.S. 437 (1877) (interest on claims to which the federal postjudgment interest statute *did not apply* because not a "judgment"); *Perkins v. Fourniquet,* 55 U.S. (14 How.) 328 (1853) (equitable decree to which postjudgment interest statute did not apply).[17]

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15. Section 966 was the predecessor statute to §1961.

16. Rule 49.1 of this Court, which deals with interest, provides that "[i]nterest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered."

17. Significantly, in *Mechanics' Nat'l Bank,* even though the predecessor postjudgment interest statute to §1961 did not apply, this Court borrowed the specific rate contained in the statute. And in *Perkins* the Court used a *lower* rate.

When Congress has prescribed, in mandatory terms, the interest rate on judgments recovered in district court, a litigant may not recover postjudgment interest at some other rate. *See Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988) (rejecting "equitable arguments" for departure from mandatory terms of Bankruptcy Code on ground that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"); *Thomas v. Arn,* 474 U.S. 140, 148 (1985) (any use of court's inherent "supervisory" power is invalid "if it conflicts with constitutional or statutory provisions"). *See generally* Beale, *Reconsidering Supervisory Power In Criminal Cases: Constitutional And Statutory Limits On The Authority Of The Federal Courts,* 84 Colum. L. Rev. 1433 (1984) (any inherent power of federal courts must be exercised within the confines of federal statutes).

B. Plaintiffs' "Discretionary" Approach Would Encourage Litigation Regarding Postjudgment Interest, Frustrate The Interest In Finality Of Litigation And Discriminate Unfairly Among Judgment Debtors On The Basis Of The Length Of The Case And Perceived Importance Of The Issues.

The Court of Appeals properly rejected plaintiffs' argument that in "exceptional" or "non-run-of-the-mill" cases courts possess "equitable discretion" to vary the postjudgment interest rate from that specified by Congress in the postjudgment interest statute. Any other result would create confusion and encourage appeals on the issue of postjudgment interest, as in this case, in which the litigation of the interest issues has already consumed three years. The postjudgment interest calculation would present to each litigant the opportunity to argue that the case was an "exceptional" one which merited deviation from the general rule. In addition,

once it found the case "exceptional", a court would be required to determine what rate of interest would adequately compensate that particular plaintiff.

Plaintiffs also fail to articulate with precision why a case might be deemed "exceptional", thus permitting deviation from the terms of §1961. They repeatedly state that Congress' specific resolution of the issue in §1961 is merely a "rule of convenience" and suggest that the statute should apply only to "routine" or "run-of-the-mill" cases and judgments. Plaintiffs argue that the courts can and should simply ignore §1961 in other cases. (Brief, at 8, 12, 22, 38). They imply that this case is in some sense different from a "run-of-the-mill" case. However, plaintiffs' suggestion is contradicted by the explicit language of both prior and amended §1961, which states, without exception, that the rate applies to "*any* money judgment in a civil case recovered in a district court." *See Mansell v. Mansell,* 109 S. Ct. 2023, 2030 (1989).

In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 269-71 (1975), this Court refused to award attorneys' fees to successful plaintiffs absent Congressional authorization. The plaintiffs there had advanced an approach similar to that suggested by plaintiffs here – that their recovery should hinge on the fact that they were acting as private attorneys general in vindicating important national interests. The Court observed that Congress had specifically legislated on the subject of attorneys' fees, as it has in the area of postjudgment interest, and therefore, the discretionary rule suggested by the plaintiffs in *Alyeska* "would make major inroads on a policy matter that Congress has reserved for itself." *Id.* at 269. In rejecting plaintiffs' approach, the Court reasoned that "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some

cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." *Id.*

This reasoning applies with equal force here. Congress enacted specific legislation governing the calculation of postjudgment interest on judgments entered in the district courts. The case-by-case, discretionary approach to the calculation of postjudgment interest suggested by plaintiffs "invades the legislature's province" and was properly rejected by the Court of Appeals. *Alyeska,* 421 U.S. at 271.

C. Section 1961 Applies To The Calculation Of Postjudgment Interest On The Money Judgment In This Case.

Plaintiffs also attempt to argue that §1961 "does not apply to judgments of the federal Courts of Appeals." (Brief, at 35-36). This suggestion likewise has no merit.

Plaintiffs are not seeking interest on a Court of Appeals' judgment.[18] They seek postjudgment interest on the $9,567,939 judgment *entered in the district court.* Section 1961 specifically applies to the calculation of interest on "any money judgment in a civil case recovered in a district court." 28 U.S.C. §1961. The statute's application does not depend on which court performs the interest calculation.

Plaintiffs further suggest that 28 U.S.C. §1912, rather than §1961, applies to the calculation of interest by the Court of Appeals. This argument is also incorrect. Section 1912 clearly does not apply here. That section provides that "[w]here a judgment is *affirmed* by the Supreme Court or a Court of Appeals, the court in its

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18. As a result of its exclusively appellate jurisdiction, the Court of Appeals does not generally enter money judgments and the December 4, 1981 judgment was not a judgment for money. *See* 28 U.S.C. §§1291-1295.

discretion may adjudge to the prevailing party just damages for his delay, and single or double costs." This section has uniformly been construed to apply only where the Court of Appeals *affirms* a judgment and makes the determination that the losing party filed a frivolous appeal for the purpose of delay. *See, e.g., Deming v. Carlisle Packing Co.,* 226 U.S. 102 (1912) (construing predecessor statute); *Grimes v. Commissioner,* 806 F.2d 1451, 1454 (9th Cir. 1986); *In re American Pres. Lines, Ltd.,* 804 F.2d 1307, 1310 (D.C. Cir. 1986); *Emaldio v. Pocahontas S.S. Co.,* 355 F.2d 55, 57 (4th Cir. 1966). The Court of Appeals never "affirmed" a judgment in this case either in the appeals on the merits, or with respect to postjudgment interest.[19] Additionally, cross-petitioners have not even argued that Kaiser's cross-appeals were frivolous or taken solely for delay. Section 1912 clearly does not apply here.

The Court of Appeals correctly applied the rate prescribed in §1961 to calculate postjudgment interest, rather than resorting to some novel, speculative and variable "equitable" measure of postjudgment interest derived from §1912, a statute that clearly has no application to the case.

D. Rule 37 Does Not Expand The Authority To Award Postjudgment Interest In A Way Inconsistent With The Terms Of §1961.

Respondents next suggest that Fed. R. App. P. 37 allows the Court of Appeals "equitable" discretion to depart from the express terms of §1961 and calculate

19. In the initial appeal by plaintiffs by on the merits, the Court of Appeals *reversed* the directed verdict entered in the district court in Kaiser's favor. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* 579 F.2d 20 (3d Cir. 1978). In the second merits appeal, which once again was an appeal the plaintiffs initiated, the Court of Appeals reversed in part and affirmed in part. (J.A.185). In its postjudgment interest decision, it reversed in part and affirmed in part. (P.A.3).

postjudgment interest without regard to the statutorily-prescribed rate. This argument has no merit, and this court has rejected similar arguments in related contexts. *See Norwest Bank Worthington v. Ahlers,* 108 S. Ct. 963, 968-69 (1988) (court's "equitable" powers do not permit it to depart from terms of federal statutes).

Fed. R. App. P. 37 provides that "[i]f a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest." This Court has consistently explained that, pursuant to 28 U.S.C. §2071, the rules promulgated by all federal courts "must also be consistent with Acts of Congress." *Frazier v. Heebe,* 482 U.S. 641, 646 n.4 (1987). *See Colgrove v. Battin,* 413 U.S. 149, 161 n.18 (1973) (if a rule "would conflict with an Act of Congress" it "would therefore be invalid"). To be a valid rule, therefore, Rule 37 must be read in harmony with 28 U.S.C. §1961 and must encompass its requirements with respect to the appropriate rate of postjudgment interest.

It is well established that "courts are not at liberty to pick and choose among Congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551 (1974). *See Watt v. Alaska,* 451 U.S. 259, 266-67 (1981). The Federal Rules of Appellate Procedure have the force and effect of statutes. *See, e.g., Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941). This principle requires that Rule 37 be construed consistently with §1961.

Rule 37 does not by its terms conflict with §1961 and the two provisions are easily "capable of co-existence." When there are two valid "judgments" from which interest might be calculated under the terms of §1961, Rule 37 simply gives the Court of Appeals the discretion to choose between the two. In all other

respects, including time period and interest rate, Rule 37 should be construed to include the mandatory terms of 1961. *See, e.g., Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 (1984); *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974); *Morton v. Mancari,* 417 U.S. 535, 551 (1974).[20]

E. Prime Rate Interest, Compounded Monthly, Would Overcompensate Plaintiffs And Would Be Manifestly Unjust.

Putting aside the clear unavailability of postjudgment interest at a rate higher than the rate specified in 28 U.S.C. §1961, the rate sought by plaintiffs is unreasonable and inequitable. The purpose of postjudgment interest is to put the plaintiffs in the position they would have been in had the defendant paid the judgment on the date the judgment was entered in the district court. Had they received the judgment on that date, the only reasonable assumption is that plaintiffs would have invested the money in some reasonably safe investment. Thus, *saving interest rates* (such as T-bill rates), not *borrowing rates,* would serve to compensate them for delay in payment. Plaintiffs concede that the "prime rate" interest they seek is a borrowing interest rate. They do not contend they would have earned prime rate

20. The Rules Enabling Act, pursuant to which Rule 37 was promulgated, explicitly declares that the rules thereunder "shall not abridge, enlarge or modify substantive rights." 28 U.S.C. §2072. *See Burlington N.R.R. v. Woods,* 480 U.S. 1, 5 (1987). Although a number of lower courts have held that postjudgment interest is "procedural" for purposes of choosing the applicable law in a diversity case, this Court has explicitly held that entitlement to prejudgment interest is a substantive right and has assumed, without deciding, that entitlement to postjudgment interest is a substantive right. *See Monessen S. Ry. v. Morgan,* 108 S. Ct. 1837 (1988); *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 815-16 (1985). Accordingly, Rule 37 should not be interpreted to enlarge the availability of postjudgment interest as provided in §1961.

interest through investment had they received the judgment prior to July 3, 1986. *See* Brief, at 7 (rate sought is "market calculation for commercial borrowers"). Thus, prime rate interest would overcompensate plaintiffs for any delay between entry of judgment and payment.

Plaintiffs also hint that they should receive prime rate postjudgment interest simply because Kaiser filed post-trial motions, appeals and petitions for certiorari. (Brief, at 46). This argument has no merit. Congress enacted a statute and authorized a rule of appellate procedure providing a mechanism for an aggrieved prevailing appellant to recover monetary sanctions if a court determines that an appeal is frivolous. *See* 28 U.S.C. §1912; Fed. R. App. P. 38; *Burlington N.R.R. v. Woods,* 480 U.S. 1 (1987). In antitrust cases, Congress has further articulated standards under which delay damages might be available in cases commenced after September 30, 1980 to deter dilatory behavior. 15 U.S.C. §15(a). Thus, there is no reason for a court to misconstrue postjudgment interest and use it punitively.

Kaiser repeatedly obtained relief in the district court on its post-trial motions. Moreover, it was plaintiffs, not Kaiser, who initiated *all three of the appeals* from the district court to the Court of Appeals in this case. Even with respect to the issues upon which plaintiffs ultimately prevailed, the courts were divided and the victories were not always unanimous. For instance, one district court granted a directed verdict to Kaiser on the entire issue of liability. *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chemical Corp.,* No. 74-122, mem. op. (E.D. Pa. July 20, 1977). In the second appeal, Circuit Judges Adams and Becker dissented from the denial of rehearing and voted for *in banc* review of the liability finding. *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, Nos. 83-1047, 83-1079, slip op. (3d Cir. March 8, 1985). Justice White of this Court would have granted certiorari on the liability issues. *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 477 U.S. 908

(1986). In the court below, Judge Stapleton dissented and three circuit judges voted for rehearing on the postjudgment interest issues. (P.A. 25, 29-30).

The post-trial motions, appeals and petitions for certiorari in this case were not frivolous, were not "relitigated", and were not pursued for purposes of receiving the benefit of the time value of money. Plaintiffs' suppressed premise that Kaiser should pay prime rate postjudgment interest as a deterrent to frivolous litigation is belied by the record and can safely be rejected by this Court.

CONCLUSION

Plaintiffs' arguments were correctly rejected by the Court of Appeals.

There is no authority for a federal district court or a Court of Appeals to award postjudgment interest beyond the amount prescribed by Congress in 28 U.S.C. §1961. Plaintiffs' attempt to obtain postjudgment interest prior to the date judgment was entered is nothing more than a disguised request for prejudgment interest to which plaintiffs are not entitled. Interest at "prime rate" is inconsistent with the unambiguous, mandatory rate specified in §1961. Such an award is neither within the "equitable" nor "inherent" power of the district court or the Court of Appeals. Further, it would overcompensate plaintiffs and penalize Kaiser for exercising its appellate rights in a case where liability was not clear. It clearly would be inequitable.

The decision of the Court of Appeals for the Third Circuit should be affirmed insofar as it held that interest may not be awarded for the period from August 22, 1979 to December 1981 and may not be calculated at a rate different from the rate prescribed by Congress in 28 U.S.C. §1961.

Respectfully submitted,

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